



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 17, 2003

Mr. W. Lane Lanford
Executive Director
Public Utility Commission of Texas
P.O. Box 13326
Austin, Texas 78711

OR2003-9103

Dear Mr. Lanford:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 192932.

The Public Utility Commission of Texas (the "commission") received a request for information related to a specified request for proposals. You state that the commission will make a portion of the requested information available to the requestor. However, you claim that some of the requested information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. Additionally, you have notified eight interested third parties of the request for information pursuant to section 552.305 of the Government Code. *See Gov't Code* § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act (the "Act") in certain circumstances). The commission has submitted the information at issue to this office. We also received correspondence from Brown Rudnick Berlack Israels, LLP ("BRBI"), Navigant Consulting, Inc. ("Navigant"), and Saber Partners, LLC ("Saber"). We have considered all arguments and reviewed the submitted information.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental

body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state that the information you have marked in Exhibits I and J consists of confidential communications between the commission and its attorney, “made for the purpose of facilitating the rendition of professional legal services to the Commission.” Upon review of your arguments and the submitted information, we conclude that the information you have marked in Exhibits I and J is protected by the attorney-client privilege, and thus, may be withheld under section 552.107 of the Government Code.¹

We turn now to the remaining submitted information for which the commission raises no exceptions and takes no position. Saber asserts that most of its proposal is excepted from disclosure under section 552.104 of the Government Code. However, section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *See Open Records Decision No. 592* at 8-9 (1991). Section 552.104 excepts information from disclosure if a governmental body demonstrates that the release of the information would cause potential specific harm to the governmental body’s interests in a particular competitive situation. *See Open Records Decision Nos. 593* at 2 (1991), 463 (1987), 453 at 3 (1986). The commission has not argued that the release of submitted

¹As we are able to make this determination, we need not address your arguments under section 552.111 of the Government Code.

information would harm the commission's interests in a particular competitive situation. Therefore, the proposal submitted by Saber may not be withheld pursuant to section 552.104 of the Government Code.

BRBI, Navigant, and Saber assert section 552.110(b) of the Government Code in regard to portions of their proposals.² Section 552.110(b) protects "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Having reviewed the submitted briefs, we conclude that BRBI and Navigant have established that certain pricing information is excepted under section 552.110. Additionally, we conclude that Saber has established that a portion of its information is excepted under section 552.110. We have marked the information that the commission must withhold. However, we find that Saber has not made the specific factual or evidentiary showing required under section 552.110(b) that the release of the remainder of its fee proposal would likely result in substantial competitive harm to it. *See generally* Open Records Decision Nos. 509 at 5 (1988) (stating that because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative). Accordingly, pursuant to section 552.110, the commission must withhold only the information we have marked.

In regard to the remaining submitted proposals, an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, none of the remaining third parties has submitted to this office any reasons explaining why their information should not be released.³ Therefore, none of the remaining third parties has provided us with any basis to conclude that they have a protected proprietary interest in any of the submitted information. *See, e.g.,* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that

²BRBI, Navigant, and Saber do not assert section 552.110(a) of the Government Code which protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov't Code § 552.110(a).

³The remaining third parties are Barrington-Wellesley Group, Inc., Fisher & Hilligoss, LLC, Milbank, Tweed, Hadley & McCloy, LLP, Kemp Smith, and New Harbor, Inc.

information is trade secret), 542 at 3 (1990). Therefore, the remaining submitted proposals are not excepted from disclosure under section 552.110 of the Government Code.

In summary, we conclude that: 1) the commission may withhold the information you have marked in Exhibits I and J under section 552.107 of the Government Code; and 2) the commission must withhold only the information we have marked in the proposals submitted by BRBI, Navigant, and Saber pursuant to section 552.110 of the Government Code. All remaining submitted information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



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Open Records Division

WMM/lmt

Ref: ID# 192932

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